



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 5, 1996

Mr. Merril E. Nunn
City Attorney
City of Amarillo
P.O. Box 1971
Amarillo, Texas 79105-1971

OR96-2300

Dear Mr. Nunn:

You ask whether certain information is subject to required public disclosure under the Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 102161.

The Amarillo City Manager (the "city manager") received a request for the transcript of a hearing conducted pursuant to Local Government Code chapter 143. The hearing concerned a firefighter's appeal of his termination. You assert that the requested transcript is excepted from required public disclosure based on sections 552.101 and 552.103 of the Government Code. You also assert that the city is not required to release the transcript to the requestor pursuant to Government Code section 552.027. Finally, you argue that the Civil Service Commission (the "commission") is not a "governmental body" subject to the act, but is part of the judiciary.

Section 552.103(a) of the Government Code reads as follows:

(A) Information is excepted from [required public disclosure] if it is information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). You argue that a civil service hearing is "litigation" for purposes of section 552.103.

This office has determined that a contested case under the Administrative Procedure Act (the "APA"), Government Code chapter 2001, constitutes "litigation." See Open Records Decision Nos. 588 (1991) (former State Board of Insurance proceeding), 301 (1982) (hearing before Public Utilities Commission). Civil service hearings are not subject to the APA, but to Local Government Code chapter 143.

In the situation at hand, the fire fighter chose to appeal to an independent third party hearing examiner under Local Government Code section 143.057. That provision provides that an independent third party hearing examiner has the same duties and powers as the commission, including the right to issue subpoenas. See Local Gov't Code § 143.057(f); see also *id.* § 143.010(d), (e) (commission subpoena authority). The commission is required to conduct the hearing fairly and impartially and render a just and fair decision. See *id.* § 143.010(g). The instant hearing was apparently also conducted pursuant to the American Arbitration Association Labor Arbitration Rules, which grant the arbitrator authority to judge the relevance of evidence offered. Thus, discovery takes place and evidence is presented at the hearing, and the independent third party hearing examiner hears and resolves questions of fact.

A district court may hear an appeal of a hearing examiner's award only on the grounds that the arbitration panel was without jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion or other unlawful means. *Id.* § 143.057(j); see also *id.* § 143.057(c) (decision to appeal to independent third party hearing examiner results in waiver of all rights to appeal to district court except as provided by Local Gov't Code § 143.057(j)). Thus, the district court does not serve as the forum for resolving the controversy on the basis of evidence; the civil service hearing so serves.

The act was not intended to provide parties to litigation earlier or greater access to information that was already available to them through existing procedures. See Open Records Decision No. 551 (1990). In general, we believe the procedures in place under Local Government Code chapter 143 and the arbitration rules should govern the release of information that relates to a pending appeal conducted pursuant to Local Government Code chapter 143. Furthermore, we believe the requested transcript clearly relates to the pending hearing.

However, we note that Local Government Code section 143.010(h) states that the commission "shall maintain a public record of each [appeal procedure] proceeding with copies available at cost." This provision would require the commission to release a hearing transcript in its possession. As an independent third party hearing examiner has the same duties and powers as the commission, see *id.* § 143.057(f), we believe an examiner must likewise make available a copy of the transcript. See *Blair v. Razis*, 926 S.W.2d 784 (Tex.

App.--Tyler 1996, no writ); *see also* American Arbitration Association Labor Arbitration Rule 21 (1993). Given the fact that the transcript is a public record, we cannot conclude that the city has a litigation interest in withholding the transcript from public disclosure. Section 552.103 does not apply to information when the release of the information would not adversely affect the litigation interests of a governmental body, *see* Open Records Decision Nos. 493 (1988), 465 (1987), when the opposing party in the litigation has access to the requested information, *see* Open Records Decision Nos. 525 (1989), 349 (1982), 320 (1982), or when information is made public by statute, *see* Open Records Decision Nos. 221 (1979), 146 (1976). Accordingly, we conclude that the city may not withhold the requested information from the requestor based on section 552.103.

Section 552.027(a) of the Government Code reads as follows:

A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.

You contend that because the transcript is commercially available to the requestor from a court reporter, the act does not require the city to release the transcript to the requestor. We disagree. As the city apparently obtained the transcript to prepare its post hearing brief, we do not believe the transcript is "a commercial book or publication [the city] purchased . . . for research purposes."

Section 552.101 of the Government Code excepts from required public disclosure information made confidential by law, including information made confidential by statute. You raise this exception in conjunction with Government Code section 52.059(b), which reads as follows:

Except as provided by Subsection (c), an attorney who appears at a deposition and the attorney's firm are jointly and severally liable for a shorthand reporter's charges for each copy of the deposition transcript requested by the attorney.

For purposes of section 552.101, a statutory confidentiality provision must be express, Open Records Decision No. 478 (1987); a confidentiality requirement will not be implied from the statutory structure, *see generally* Open Records Decision No. 465 (1987). Section 52.059(b) speaks to liability for a shorthand reporter's charges for copies of a deposition transcript. We do not believe section 52.059(b) renders the requested transcript confidential for purposes of section 552.101 of the Government Code.

Turning to the question of whether the commission must release the requested transcript, we need not consider your arguments that the commission is not a governmental body subject to the Open Records Act or your assertion that the commission is part of

the judiciary. We do not understand the commission to be involved in the appeal here since the firefighter chose to appeal to an independent third party hearing examiner. In either case, the request here is directed to the city manager.

In conclusion, the city may not withhold the requested transcript from the requestor. The city may charge the requestor for the cost of the copies according to the cost provisions in the Open Records Act. *See* Gov't Code §§ 552.261, 552.262.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/rho

Ref.: ID# 102161

Enclosures: Submitted documents

cc: Mr. Mike Higgins
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(w/o enclosures)